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# THE TRIAL OF SLOBODAN MILOSEVIC: THE DEMISE OF HEAD OF STATE IMMUNITY AND THE SPECTER OF VICTOR'S JUSTICE

Scott Grosscup

The conflict in Yugoslavia during the last decade has culminated in unprecedented events in international law due to circumstances particular to the region. The war exposed a number of the intense ethnic tensions between Bosnian, Croatian, and Serb populations<sup>1</sup> that had lain dormant in the Balkan region for many years under the rule of General Josip Broz Tito.<sup>2</sup> The fall of the Soviet Empire in the late 1980's and early 1990's, and the rise of right to self-determination principles in the region during the same period,<sup>3</sup> brought instability and war to Europe, the likes of which had not been seen since the end of World War II. The resulting ethnic hatred and political instability led an international force to bring peace to the region<sup>4</sup> and has seen the first instance where the leader of an independent state is on trial for crimes that occurred while he was in power.<sup>5</sup>

The events that began in Yugoslavia in the early 1990's are not over. However, the majority of the violence that accompanied the rise and fall of Slobodan Milosevic has subsided.<sup>6</sup> The conflict involved numerous states and international organizations.<sup>7</sup> After ten years, United Nations troops are still

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1. See generally JOSEPH ROTHSCHILD, RETURN TO DIVERSITY, A POLITICAL HISTORY OF EAST CENTRAL EUROPE SINCE WORLD WAR II 260-262 (Oxford University Press 1993).

2. See GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE 209 (Princeton University Press 2000) (estimating that Josp Broz Tito and his communist partisans executed between 20,000 and 40,000 of the opposition Ustasha fascists in Tito's rise to power, mostly through summary executions, for fear that criminal trials would enrage ethnic tensions).

3. See generally ROTHSCHILD, *supra* note 1.

4. See Roger Cohen, *Crisis in the Balkans*, NY TIMES, June 15, 1999, at A1 (quoting a United Nations mediator,0 Carl Bildt, "An international military presence to guarantee peace in the Balkans must be seen in the coming decades").

5. Sheema Khan, Comment, *Welcome Ex-Dictators, Torturers and Tyrants: Comparative Approaches to Handling Ex-Dictators and Past Human Rights Abuses*, 37 GONZ. L. REV. 167-194 (2002) (comparing state actions against ex-dictators involved in human rights violations and the role of the International Criminal Court in bringing ex-dictators to justice).

6. See generally U.S. Department of State, *Background Note: Serbia and Montenegro*, available at <http://www.state.gov/r/pa/ei/bgn/5388.htm> (last visited Feb. 27, 2004).

7. In addition to the United Nations and NATO forces, the Red Cross, Amnesty International and numerous other organizations have provided assistance and aid to the redeveloping nations. See *Bosnia Help Organizations*, available at <http://www.cco.caltech.edu/~bosnia/help/org.html> (last visited Feb. 27, 2004) (listing of some of these agencies).

deployed in the region,<sup>8</sup> serving to keep the peace, and numerous non-governmental organizations (NGOs) are on the ground, administering aide, overseeing relocation programs, and ensuring safe transitions to democracy<sup>9</sup>

The conflict in Yugoslavia has also forged new ground on how the international community deals with a nation's internal conflicts.<sup>10</sup> This includes international intervention by a regional peacekeeping force<sup>11</sup> and, in particular, the first trial of a sitting head of state for state sanctioned criminal activities, and violations of the evolving area of human rights law<sup>12</sup>

This paper will examine the trial of Slobodan Milosevic, former President of Serbia and the Federal Republic of Yugoslavia. Part I discusses the events that led to the arrest and charges against Milosevic. Part II explores why traditional notions of sovereign immunity have not applied to his trial. Part III examines the reasons why the international community has made an effort to prosecute the former president. Lastly, Part IV looks at the impacts the trial will have on the former Yugoslavian states,<sup>13</sup> and potential ramifications if the prosecution fails to convict the former president.

#### PART I — TURMOIL IN THE BALKANS: THE RISE AND FALL OF MILOSEVIC

Prior to the eruption of war in 1991, Yugoslavia was the "Darling of the West."<sup>14</sup> During this period, Yugoslavia received most-favored-nation status, technology transfers, and cultural exchanges.<sup>15</sup> However, the Balkan states<sup>16</sup> have complex ethnic and religious characteristics that have fueled conflict between the

8. See generally UNITED NATIONS MISSION IN BOSNIA AND HERZEGOVINA, available at [http://www.un.org/Depts/DPKO/Missions/unmibh/unmibh\\_body.htm](http://www.un.org/Depts/DPKO/Missions/unmibh/unmibh_body.htm) (last visited Nov. 30, 2002); see also UNITED NATIONS INTERIM ADMINISTRATION MISSION IN KOSOVO, available at <http://www.unmikonline.org/> (last visited Nov. 30, 2002).

9. A search of the Regional Environmental Center found 127 environmentally focused non-governmental organizations operating in Bosnia-Herzegovina, 150 in Croatia and 160 in Yugoslavia. Available at <http://www.rec.org/REC/Databases/NGODirectory/NGOFind.html> (last visited Nov. 22, 2002).

10. There is some debate as to whether the conflict in the former Yugoslavia constitutes an international or an internal conflict. The International Criminal Tribunal for the Former Yugoslavia (ICTY), for purposes of jurisdiction, has decided that the war in Yugoslavia was of international character.

11. See generally NATO Fact Sheet, NATO's role in Bosnia and Herzegovina, available at <http://www.nato.int/docu/facts/2000/role-bih.htm>.

12. See, e.g., Richard B. Bilder, *Kosovo and the "New Interventionism" Promise or Peril?* 9 J. TRANSNAT'L L. & POL'Y 153 (1999) (exploring the doctrine of humanitarian intervention in Kosovo).

13. The former Yugoslavia was composed of six republics, Slovenia, Croatia, Bosnia-Herzegovina, Serbia (with the once autonomous regions of Vojvodina and Kosovo), Montenegro, and Macedonia.

14. JOHN FEFFER, *SHOCK WAVES EASTERN EUROPE AFTER THE REVOLUTIONS* 254 (South End Press 1992).

15. *Id.*

16. The Balkans states are located between the Adriatic Sea to the west and the Black Sea on the East, with Turkey and Greece to the South, and Slovakia and Ukraine to the North. SATELLITE WORLD ATLAS 78-79 (Helicon Publishing 2001) (1999).

Bosnian, Serb, and Croatian populations.<sup>17</sup> The assassination of Austrian Archduke Ferdinand by a Bosnian Serb nationalist in 1914 was the spark that sent the modern world into what was at that point the worst war in history.<sup>18</sup> After World War I, the Balkan states formed the state of Yugoslavia in 1929.<sup>19</sup> This union of ethnic Serb, Croat, and Slovene populations was tenuous, and in 1934 a member of the Croatian independence movement assassinated King Alexander of Yugoslavia.<sup>20</sup> Yugoslavia once again saw an invasion, but this time by the Axis powers of Germany and Italy in World War II.<sup>21</sup> During the War, Croatian collaborators worked to rid Croatia of Serbs, mimicking the Nazi concentration camps and exterminating over 500,000 Serbs and displacing another million.<sup>22</sup> Communist partisan forces, led by Josip Broz Tito and assisted by the Allied powers, helped rid the territories of Axis occupation.<sup>23</sup> From 1945 until Tito's death in 1980, ethnic tensions and nationalistic movements were suppressed by the state through relocating Serb minorities in the various republics outside of Serbia.<sup>24</sup> Professor Michael Scharf notes, "Tito's death and the collapse of the Soviet threat in the late 1980's unleashed the long-festering centrifugal forces that would soon lead to Yugoslavia's disintegration."<sup>25</sup>

The next section explores the recent history of the conflict in the former Yugoslavia, the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY), and events leading to the arrest and indictment of Slobodan Milosevic as potential precedent necessary for the international community to respond to conflict and serving as the base line for international law and the demise of heads of state immunity

### *1 History of the conflict*

Slobodan Milosevic was born in Pozarevac, Serbia in 1941 to a communist activist mother and absent father.<sup>26</sup> Milosevic excelled at the University Law School in the 1960's.<sup>27</sup> After earning his law degree, Milosevic held several Communist Party positions in city government and was appointed president of the largest state-run bank in 1978.<sup>28</sup> In 1986, Milosevic was appointed Communist

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17. See MICHAEL P. SCHARF & WILLIAM A. SCHABAS, *SLOBODAN MILOSEVIC ON TRIAL* 14 (The Continuum International Publishing Group, Inc. 2002) (citing commentators who date the beginnings of the turmoil in the Balkans to 1389 when the Ottoman Turks defeated Serbian forces in the battle of Kosovo Polje, starting several hundred years of occupation by the Ottoman Empire).

18. See *id.* at 15. The assassination occurred on the anniversary of the battle of Kosovo Polje which occurred 525 years earlier.

19. *Id.* at 15-16.

20. *Id.* at 16.

21. *Id.*

22. *Id.*

23. *Id.* at 17.

24. *Id.* at 17.

25. *Id.* at 18.

26. *Id.* at 5 (noting that both parents eventually committed suicide).

27. *Id.*

28. *Id.* at 8.

Party leader after his friend and close ally, Ivan Stambolic, became President of Serbia.<sup>29</sup> That same year the Serb Academy of Arts and Sciences published a memorandum that became the manifesto of the Serb nationalist movement and led to Milosevic's rise to power.<sup>30</sup> While Communist Party leader, Milosevic was sent to Kosovo to quiet a Serb uprising against the Albanian majority<sup>31</sup> Milosevic spoke to a crowd of Kosovar Serbs and said:

No one has the right to beat our people! This is your land, these are your homes, these are your fields, your gardens, and your memories Would you shame your ancestors and disappoint your children? We will win this battle. Yugoslavia does not exist without Kosovo Yugoslavia and Serbia will not give it away.<sup>32</sup>

Milosevic used these nationalistic emotions, suppressed by the Tito regime for years, to become President of Serbia in 1989 just as anti-Serb nationalism rose in the republics of Croatia and Slovenia.<sup>33</sup>

In June 1991, at the order of President Milosevic, the Yugoslav National Army invaded Slovenia and Croatia under the guise of "protecting" Serbs living in those republics from anti-Serb sentiments.<sup>34</sup> In a brutal military campaign, the Serbs quickly gained control over nearly one-third of the Republic of Croatia.<sup>35</sup> United Nations investigators later found mass graves in numerous places including outside the city of Vukovar, where Serb forces massacred over 200 Croatian hospital patients.<sup>36</sup>

Citing the rising tide of war in the region, the United Nations Security Council adopted Resolution 713 in September 1991, which imposed an embargo on the sale of arms to areas within the territory of Yugoslavia and called for the parties to abide by the ceasefire agreement they had signed just a few days earlier in Igalo.<sup>37</sup> By February 1992, satisfied that the conditions had been met for the deployment of peace-keeping operation to the region, the United Nations Security Council adopted Resolution 743, establishing the United Nations Protection Force (UNPROFOR).<sup>38</sup> Subsequently, the Republic of Bosnia and Herzegovina voted for independence from Yugoslavia on March 1, 1992,<sup>39</sup> which was recognized by the European Community on April 6, 1992.<sup>40</sup> Shortly after the dissolution of

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29. *Id.* at 9.

30. *Id.* at 9-10.

31. *Id.* at 10.

32. *Id.*

33. *See id.* at 11. The leaders of Croatia, Franjo Tudjman, and Slovenia, Milan Kucan, sought to dilute Serbian influence in Yugoslavia by creating a loose federation of states, leading to the dissolution of Yugoslavia in 1991. *Id.* at 19.

34. *Id.* at 19-20.

35. *Id.* at 20.

36. *Id.*

37. S.C. Res. 713, U.N. SCOR, 3009th mtg., U.N. Doc. S/Res/713 (1991).

38. S.C. Res. 743, U.N. SCOR, 3055th mtg., U.N. Doc. S/Res/743 (1992).

39. SCHARF, *supra* note 18, at 22.

40. STEVE TERRETT, THE DISSOLUTION OF YUGOSLAVIA AND THE BADINTER ARBITRATION

Yugoslavia, Serb forces attacked Croatian and Bosnian Muslim populations in the republic of Bosnia and Herzegovina to unite Bosnian Serb populations with greater Serbia.<sup>41</sup> Although the official Yugoslav National Army (JNA) eventually pulled out of Bosnia and Herzegovina, Serbia continued to arm and direct Bosnian Serbs in the self-declared "Republika Srpska, a Serb-dominated area of BiH,"<sup>42</sup> over the next few years committing violations of international humanitarian law,<sup>43</sup> numerous mass killings,<sup>44</sup> and attacks on United Nations designated "safe areas."<sup>45</sup> The United Nations's inability to provide security for these areas led civilians to call their "guests" by the derogatory name, "UNprotection Force, from the acronym UNPROFOR, or United Nations Protection Force."<sup>46</sup> One of the worst massacres of the war occurred in eastern Bosnia in the town of Srebrenica after Bosnian-Serb troops overran United Nations peacekeeping forces and then executed thousands of unarmed men and boys alongside trenches.<sup>47</sup>

In 1995, after air strikes carried out by the United States with NATO support, Slobodan Milosevic traveled to the United States and signed the Dayton Peace Accord dividing Bosnia and Herzegovina into two "entities:" the Bosnian-Serb "Republika Srpska" and the Muslim-Croat Federation.<sup>48</sup> The accord also allowed for greater deployment of United Nations Peacekeeping forces known as IFOR.<sup>49</sup> After several years of war, and up to 250,000 Muslim deaths and the displacement

COMMISSION: A CONTEXTUAL STUDY OF PEACE-MAKING EFFORTS IN THE POST COLD WAR WORLD 33 (Ashgate Publishing Co. 2000).

41. SCHARF, *supra* note 18, at 22. Bosnian Serb forces led by Radovan Karadzic seized control of nearly seventy-percent of Bosnia leaving several enclaves under Bosnian control—Sarajevo, Mostar, Bihac, Tuzla, Srebrenia, and Gorazde.

42. NORMAN CIGAR & PAUL WILLIAMS, *INDICTMENT AT THE HAGUE: THE MILOŠOVIĆ REGIME AND CRIMES OF THE BALKAN WAR* 25 (New York University Press 2002); TERRET, *supra* note 41, at 33.

43. *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 789 (1992)*, U.N. SCOR, 49th Sess., at Part IV U.N. Doc S/1994/674 (1994), available at: <http://webmedia2.depaul.edu/ihrli/publications/yugoslavia.asp>. See also *Prosecutor v. Dusko Tadic*, Judgment of the Appeals Chamber, IT-94-I-A (1999). Dusko Tadic was the first war criminal to be tried by the International Criminal Tribunal for the former Yugoslavia. Tadic was convicted of individual criminal responsibility of willful killing; torture or inhuman treatment; willfully causing great suffering or serious injury to body or health; crimes against humanity and violations of customs of war all in violation of the 1949 Geneva Convention. Tadic was present at the Omarska, Keraterm, and Trnopolje camps in the Republic of Bosnia where he participated in "horrendous treatment" upon non-Serb populations including the forced transfer of civilians to camps, beatings, and killings of those civilians. Tadic was sentenced to twenty years in a German prison for violations of international humanitarian law.

44. *Id.* at 61.

45. See SCHARF, *supra* note 18, at 26-27. United Nations forces were deployed to protect and demilitarize the six "safe areas" with a force of 7,500.

46. See, e.g., Emma Daly, *Croats Dismiss Fears Of New War* Independent (London), Jan. 23, 1995, at 8.

47. YVES BEIGBEDER, *JUDGING WAR CRIMINALS* 149 (St. Martin's Press, Inc., 1999) (describing the July 11, 1995 Serb attack on the U.N. safe haven of Srebrenica, in which over 40,000 people, mostly Bosnian Muslims, fled the area and anywhere from 4,000 to 10,000 men and boys were systematically killed).

48. TERRET, *supra* note 41, at 96.

49. SCHARF, *supra* note 18, at 30-31.

of over 2 million from Serb-controlled areas in Bosnia and Herzegovina,<sup>50</sup> it appeared that violence in the region had reached its maximum and peace was on the horizon.<sup>51</sup>

Ideas of self-determination permeated the region, however, and, in 1996, the Kosovo Liberation Army (KLA) began attacking Serbian positions.<sup>52</sup> Serbian forces then turned their energies away from Bosnia and Herzegovina and began clearing ethnic Albanians from the territory of Kosovo through forced relocation and killings of civilians.<sup>53</sup> The ensuing exodus of the ethnic Kosovo Albanians brought about another NATO bombing campaign,<sup>54</sup> the withdrawal of Serb forces from the region, and a new government in Serbia.<sup>55</sup>

The NATO led bombing campaign, economic crisis, international pressure, and years of unrest evaporated Milosevic's grasp on power. In September 2000, Vojislav Kostunica defeated Milosevic in the Federal Republic of Yugoslavia's presidential elections.<sup>56</sup> Milosevic did not recognize the results of the election even though the Constitutional Court of Yugoslavia and the Serbian Parliament recognized Kostunica as the legitimate president.<sup>57</sup> Milosevic finally submitted his resignation on October 6, 2000, after Serb soldiers along with thousands of protesters stormed government buildings ending his tenure as president.<sup>58</sup> As a result of the change in leadership, the United States lifted the oil embargo and flight ban that had been imposed on the region since 1998.<sup>59</sup> At the same time, leaders with the International Monetary Fund (IMF) announced plans to readmit Yugoslavia,<sup>60</sup> which had lost membership in the international financial institution in 1992.<sup>61</sup> IMF membership enabled access to significant financial support for the tattered country's redevelopment.

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50. *Id.* at 35.

51. Raymond Bonner, *Bosnian Civilians Hopes for Peace Are Modest*, N.Y. TIMES, Dec. 20, 1995, at A10.

52. SCHARF, *supra* note 18, at 33.

53. Serb forces conducted killings of civilians as well as ethnic cleansing through rapes of Albanian women with the intent of impregnating them with Serbian children. *See generally* Todd A. Salzman, *Rape Camps as a means of Ethnic Cleansing: Religious, Cultural and Ethical Responses to Rape Victims in the Former Yugoslavia*, 20 HUM. RTS. Q. 348, 363 (1998) (estimating anywhere from 20,000 to 70,000 survivors of rape from Serbian forces).

54. *Id.* at 34. NATO, using primarily the United States Air Force, bombed Serb forces from March 24, 1999 through June 9, 1999.

55. Steven Erlanger, *Showdown in Yugoslavia*, N.Y. TIMES, Oct. 7, 2000, at A1.

56. SCHARF, *supra* note 18, at 36.

57. Erlanger, *supra* note 52.

58. SCHARF, *supra* note 18, at 36.

59. Lawrence L. Knutson, *U.S. Lifts Yugoslavia Sanctions*, AP ONLINE, Oct. 12, 2000, available at 2000 WL 27905642 (citing commentators who have noted that these sanctions were not in place during the war that dissolved the former Socialist Federal Republic of Yugoslavia from 1991 through 1995, discussed above, which experienced far greater casualties than the events in Kosovo).

60. *Id.*

61. *Id.*

## 2. *Creation of the ICTY*

The United Nations Security Council, pursuant to Article 39 of the United Nations Charter,<sup>62</sup> established the International Criminal Tribunal for the Former Yugoslavia (ICTY) on May 25, 1993.<sup>63</sup> Resolution 827 creating the ICTY states that the "situation [in Yugoslavia] continues to constitute a threat to international peace and security" and that the "establishment of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would contribute to the restoration and maintenance of peace."<sup>64</sup> The ICTY was designed to help restore peace in the region by serving internationally recognized views of justice, including the right to a fair trial.<sup>65</sup> The ICTY is composed of sixteen permanent judges from different states,<sup>66</sup> seven of whom serve in an appeals chamber where five judges sit on any individual appeal.<sup>67</sup> The ICTY Statute also creates the Office of the Prosecutor who is responsible for investigating and prosecuting persons accountable for "violations of international humanitarian law committed in the territory of the former Yugoslavia since January 1, 1991."<sup>68</sup> The prosecutor is ultimately responsible for determining whom to charge.<sup>69</sup>

The creation of the ICTY is not the first time that a special international tribunal has been created by an international organization for prosecuting war criminals.<sup>70</sup> However, its creation and potential success or failure does come at a significant time in history when countries of the world are working to define the scope and power of the International Criminal Court (ICC) created by the Rome Statute in 1998.<sup>71</sup>

In order to understand the ICTY it is important to first understand the court's primary predecessor, the Nuremberg International Military Tribunal. Although not

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62. U.N. CHARTER art. 39, states: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 4 and 42, to maintain or restore international peace and security."

63. *Security Council Resolution on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law and Humanitarian Law Committed in the Territory of the Former Yugoslavia*, S.C. Res. 827, U.N. SCOR, 84th Sess., 3217th mtg., U.N. Doc. S/Res/827, 1993.

64. *Id.*

65. *See id.*, *see also* AMENDED STATUTE OF THE INTERNATIONAL TRIBUNAL ART. 21, *available at* <http://www.un.org/icty/basic/statut/stat2000.htm>.

66. *See id.* at art. 12, para. 1.

67. *Id.* at para. 3.

68. *Id.* at art. 16, paras. 1, 3.

69. *See id.* at art. 18, paras. 1, 4.

70. *See* BASS, *supra* note 3, at 5 (documenting six times when states have dealt with issues of international justice prior to the creation of the ICTY these include trials of the Bonapartists in 1815 after the 100 Days War; trials of German war criminals after World War I; prosecution of Turk perpetrators of the Armenian genocide; the Nuremberg trials of Nazi war criminals; the trial of Japanese war criminals in Tokyo; the current ex-Yugoslavia tribunal; and the trial for crimes that occurred in the genocide in Rwanda).

71. *See Final Report of the Commission of Experts, supra* note 44, at part IV



the first international court, the Nuremberg Tribunal serves as a significant example for how high-level politicians and senior military officers were put on trial for their part in crimes against humanity, war crimes, and crimes against peace.<sup>72</sup> The Nuremberg Tribunal, however, only judged the participation of Nazi officials during World War II.<sup>73</sup> As such, the tribunal has been labeled as a sort of "victors' justice," where the nationality of the judges and prosecutors were the same as those who won the war.<sup>74</sup> In fact, the Nuremberg Tribunal was created several months after the end of the war in Europe by an agreement of the United States, French, British, and Soviet representatives and did not include input from others in the international community.<sup>75</sup> The fledgling United Nations, created in June 1945 could have provided the opportunity for international input in establishing the Nuremberg Tribunal,<sup>76</sup> but it was bypassed by the victorious nations.<sup>77</sup>

The Nuremberg Tribunal also established general principles of criminal responsibility for individual state actors during wartime activities for international law.<sup>78</sup> This principle was later adopted by the United Nations General Assembly as Resolution 95 (I).<sup>79</sup> This movement away from actions between states to actions by states against individuals is a significant change in how the international community is willing to prosecute individuals acting during times of war. Perhaps, the world was appalled after learning about the acts of the Nazi's during the war and sought some relief through what seemed to be a more humane and proper treatment after all the bloodshed. Nonetheless, the Allied forces ran what some have called "kangaroo courts" to prosecute those that had been vanquished.<sup>80</sup>

The Nuremberg Tribunal did not have the opportunity to try the major leaders of the Nazi regime due to the fact that individuals such as Adolf Hitler, and several

72. BEIGBEDER, *supra* note 44, at 27.

73. *Id.* at 39 (stating that many modern scholars accept that activities undertaken by the Allied forces, including fire-bombing of German cities and the dropping of the atomic bombs on Hiroshima and Nagasaki, would constitute war crimes defined as "wanton destruction of cities, towns or villages, or devastation not justified by military necessity").

74. *Id.* at 39.

75. See *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal*, Aug. 8, 1945, pmbl., 59 Stat. 1544, 82 U.N.T.S. 279, 284 (charter) [hereinafter *Nuremberg Agreement and Tribunal*] (in which the governments of the United Kingdom of Great Britain and Northern Ireland, the United States of America, the provisional government of the French Republic and the Union of Soviet Socialist Republics declared they were "acting in the interests of all the United Nations" in concluding their agreement on how to prosecute German officials).

76. The United Nations Charter entered into force on October 24, 1945, while the International Military Tribunal was signed and entered into force on August 8, 1945. See U.N. Charter, *supra* note 59; *Nuremberg Agreement and Tribunal*, *supra* note 72.

77. See *Nuremberg Agreement and Tribunal*, *supra* note 72.

78. U.N. Charter, *supra* note 59, at art. 6.

79. See *Affirmation of the Principles of International Law Recognized by the Charter of Nuremberg Tribunal*, G.A. Res. 95(I), U.N. GAOR, 1st Sess., U.N. Doc. A/236 (1946).

80. See generally Richard Falk, *Telford Taylor And The Legacy Of Nuremberg*, 37 COLUM. J. TRANSNAT'L L. 693 (1999).

key office holders, Heinrich Himmler and Josef Goebels, were already dead.<sup>81</sup> However, key actors such as General Herman Goering, and Foreign Minister Joachim von Ribbentrop, were tried and sentenced to death.<sup>82</sup> Recognizing that the Tribunal was created by the victors, the chief prosecutor for the United States, Robert E. Jackson, stated, "If these men are the first war leaders of a defeated nation to be prosecuted in the name of the law, they are also the first to be given a chance to plead for their lives in the name of the law."<sup>83</sup> Even though a court of victor nations conducted the trials, which effectively preordained the outcome, those charged had the opportunity to plead their defense before a court.<sup>84</sup> For example, several of the lower ranking officers were eventually found not guilty and set free.<sup>85</sup> The Nuremberg Tribunal thus set the stage and the precedence for trying war criminals.<sup>86</sup>

Unlike Nuremberg, there were not yet any victors at the time of the creation of the ICTY. Modern media coverage broadcasted war images worldwide, including the images of prisoner of war camps reminiscent of the German death camps of World War II.<sup>87</sup> International public opinion called for *something* to be done, and the United Nations responded with the creation of the ICTY in 1993.<sup>88</sup> The ICTY created an alternative to the costly use of military force by major powers. It allowed the United Nations to make up for its inability to stop the war by creating a tribunal to punish the perpetrators of crimes that the United Nations was unable to prevent.<sup>89</sup>

Although there was not a "victor" in the Balkan conflict, the Nuremberg precedent of "victors' justice" was the image that the ICTY has attempted to avoid with marginal success.<sup>90</sup> This desire for neutrality is buttressed by the unfortunate reality that a criminal court's effectiveness is dependent on its ability to exercise power over the criminal defendant. In order for a court to make an act by an individual who is foreign to the court illegal, such as had been done with the

81. BEIGBEDER, *supra* note 44, at 35.

82. *Id.* at 35-36, 38.

83. *Id.* at 40-41.

84. *See id.* at 39.

85. *Id.* at 38.

86. *Id.* at 39. Justice Robert Jackson, on leave from the United States Supreme Court has been credited with perhaps "the worst cross examination in history" for his treatment of Hermann Goering. His performance was of little matter, as Goering's guilt was predetermined. *See* Scott W. Johnson and John H. Hinderaker, *Guidelines for Cross-Examination: Lessons from the Cross-Examination of Hermann Goering*, 59 OCT. BENCH & B. MINN. 22 (2002).

87. National magazines in the United States, such as *Time* and *Newsweek*, ran full stories with horrifying images and international film crews like the *BBC* and *CNN* delivered the images as well of emaciated men in the Omarska, Keraterm, and Trnopolje camps.

88. Ivan Simonovic, *The Role of the ICTY in the Development of International Criminal Adjudication*, 23 FORDHAM INT'L L.J. 440, 442 (1999).

89. Diplomatic attempts to stop the fighting between the former Yugoslav Republics continued to fail until the Dayton Peace Agreement in 1995. From 1993 to 1995, the ICTY served as token action by the international community towards an end to the conflict. BEIGBEDER, *supra* note 44, at 146-47.

90. BASS, *supra* note 3, at 282. (quoting tribunal President Cassese, in reacting to the claims of victors justice, as stating "this is truly international institution, it is an expression of the entire world community, not the long arm of four powerful victors").

Nuremberg Tribunal and now with Milosevic, the court must also have the power to enforce its jurisdiction and to adjudicate the criminal matter.<sup>91</sup> The ICTY is able to exist and prosecute Milosevic because of NATO's subsequent bombardment and occupation of areas of the former Yugoslavia and the willingness of the Serbian leadership to turn him over to the ICTY

### 3. *The arrest and indictment*

Milosevic remained in Serbia for several months after his resignation in October 2000, even though he was a fugitive in the eyes of the international community.<sup>92</sup> The prosecutor for the ICTY indicted Milosevic during the second NATO bombing campaign alleging war crimes and crimes against humanity.<sup>93</sup> The indictment was issued sixty days into the NATO bombing campaign against Serbia, on May 22, 1999.<sup>94</sup>

In April 2001, almost two years after his indictment by the ICTY, Serbian police arrested Milosevic.<sup>95</sup> Upon his arrest and confinement in a Serbian prison, President George W. Bush released \$50 million in aid to the Serbian republic for its capture and detention of Milosevic.<sup>96</sup> It was not clear what would have happened to Milosevic in the Serbian prison. By not acting however, it appears that NATO and other world powers were willing to let Milosevic remain in Serbian custody. In addition, the recently elected President Kostunica was unwilling to turn Milosevic over to NATO powers.<sup>97</sup> Then, seemingly overnight, the United States and NATO changed gears, deciding that Milosevic should be tried by the ICTY and conditioned an additional \$1.28 billion in aid on the surrender of Milosevic.<sup>98</sup>

President Kostunica remained reluctant to turn over Milosevic to the ICTY.<sup>99</sup> But in June 2001, Serbian Prime Minister Zoran Djindjic, a political rival, ordered Serbian police to take Milosevic to an American airbase in Bosnia.<sup>100</sup> From there,

91. Alfred P. Rubin, *Pining Guilt on Pinochet*, 6 ILSA J. INT'L & COMP. L. 371, 372 (2000) (stating that "I know of no case in which war criminal or other supposed violator of 'international criminal law' from major power has ever been tried by a neutral tribunal").

92. Charles Trueheart, *War Crimes Charge to be Announced Against Milosevic*, WASH. POST, May 27, 1999, at A1.

93. *Id.*

94. *Id.*

95. Not surprisingly, Milosevic was charged by the Serbian police with abuse of office and embezzlement, not crimes against humanity or genocide. Sam Cereste, *The International Court of Justice, the International Criminal Court, and the Ad Hoc Tribunals*, 17 N.Y.L. SCH. J. HUM. RTS. 911, 913 (2001).

96. SCHARF, *supra* note 18, at 37.

97. *Id.*

98. *Id.* at 106. The requirement that Milosevic be turned over to the ICTY at The Hague served almost as an overnight reversal of United States foreign policy. United States Senator Mitch McConnell (R-KY) inserted an appropriations rider requiring that Milosevic be turned over to the international court as pre-condition for receiving any additional funds. *Id.*

99. See *Slobodan Milosevic Arrested, Charged with Corruption*, UN WIRE, Apr. 2, 2001, at <http://www.unfoundation.org>.

100. Marlise Simons and Carlotta Gall, *The Handover of Milosevic*, N.Y. TIMES, June 29, 2001, at

he was flown to The Hague, Netherlands, for trial by the ICTY for genocide, war crimes, and crimes against humanity committed in the former Yugoslavia.<sup>101</sup> The charges stated that Milosevic had “planned, instigated, ordered, [or] committed” crimes prohibited by statute in Croatia, Bosnia, and Kosovo.<sup>102</sup> The newly elected government in the Federal Republic of Yugoslavia disagreed over the extradition, which led to the resignation of several members. However, two days after the arrest of Milosevic, the Belgrade government was granted \$1.28 billion in aid by NATO allies, quieting much of the political unrest that had been brewing for the new government.<sup>103</sup> The \$1.28 billion put the world on notice regarding the amount of money that would be necessary to bring the former leader to trial.

## PART II — WHY HEAD OF STATE IMMUNITY DOES NOT APPLY TO MILOSEVIC

One might ask, “Why isn’t Milosevic using the defense of head of state immunity to deny the ICTY from hearing his case?” A possible answer could be that he has other defenses that go to show that he in fact did not make the orders to carry out the killings by the Serb paramilitary forces in Croatia, Bosnia, or Kosovo.<sup>104</sup> Another answer, and one that Milosevic appears to follow by not raising the issue of head of state immunity,<sup>105</sup> is that traditional notions of sovereign immunity are disappearing in international law. Current trends in international law show that criminally defined acts that are committed by any individual, whether they are done while serving as head of state, constitute crimes that may be tried by an international court. It will be argued that such crimes are no longer afforded immunity as political realities outweigh any immunity defense. This next section examines the deterioration of immunity for heads of states in international criminal law and the impact it has on Milosevic’s trial.

### 1 *Absolute immunity*

Traditional notions of sovereignty hold that internationally recognized nations are not to have their domestic affairs compromised by foreign nations.<sup>106</sup> This notion of sovereignty allows the political body of a state within a specific territory to be the sole arbiter of what constitutes legitimate behavior within that state.<sup>107</sup> While states can invite influence, such as in the form of financial or military aid, the ruling political entity remains the sole decision maker for the state leaving

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A1.

101. *Id.*

102. See *Indictment of the Prosecutor of the Tribunal Against Slobodan Milosevic*, IT-01-51-1, (1999).

103. SCHARF, *supra* note 18, at 37.

104. In fact a major issue facing the prosecution is the fact that Serb forces did not keep paper trail of orders, and most if any orders from Milosevic were made orally.

105. SCHARF, *supra* note 18, at 105.

106. STEPHEN D. KRASNER, *SOVEREIGNTY ORGANIZED HYPOCRISY* 19 (Princeton University Press 1999). The term absolute sovereignty stems from the Treaty of Westphalia signed in 1648 creating ideas of the modern state and allowing for actions within a state to be free from foreign scrutiny.

107. *Id.* at 20.

foreign states unable to interfere with the inner workings of the sovereign state.<sup>108</sup>

This notion of sovereignty also applied to heads of state who held immunity from civil or criminal prosecution at any point while serving as head of state or after their tenure.<sup>109</sup> In *Kahan v. Pakistan Federation*,<sup>110</sup> the English court held that a "foreign sovereign is entitled to immunity from civil proceedings in the courts of any other country, unless, upon being sued, he actively elects to *wave* his privilege and to submit to the jurisdiction."<sup>111</sup> While the action against the Pakistan Federation was a civil claim for a breach of contract,<sup>112</sup> the court stated, "It is established beyond question that a mere agreement by a foreign sovereign to submit to the jurisdiction of the courts of this country is wholly ineffective if the foreign sovereign chooses to resile from it."<sup>113</sup> The Pakistan Federation's agreement allowed the English court to resolve contract disputes,<sup>114</sup> but Pakistan later chose not to grant such jurisdiction when the matter came before the court.<sup>115</sup> Because of the rule granting immunity to the sovereign of a state, the court dismissed the complaint.<sup>116</sup> *Kahan* serves as an example of the application of absolute immunity where no state has jurisdiction in adjudicating claims against the sovereign state or its political head.

## 2. Restrictive immunity

The traditional notion of granting immunity to a head of state continued well into the last decade of the twentieth century in United States courts as shown by the case of the former president of Haiti, Jean-Bertrand Aristide, who was elected in December 1990.<sup>117</sup> An unsuccessful military coup was attempted against President Aristide in January 1991, shortly after his election.<sup>118</sup> However, in September of the same year, Aristide fled Haiti after a second, and this time successful, coup.<sup>119</sup> While in exile, a resident of New York filed suit against President Aristide for killing her husband, Dr. Roger Lafontant, in federal district court in New York.<sup>120</sup> The complaint alleged that President Aristide ordered the execution of Dr. Lafontant shortly before Aristide was exiled because of the

108. *Id.* at 21.

109. See *Mighell v. Sultan of Johore*, 1 Q.B. 149 (1893) (finding that foreign sovereign acting as private individual and residing in England under an assumed name had sovereign immunity for breach of contract even though he had concealed the fact that he was a sovereign).

110. *Kahan v. Pakistan Fed'n*, 2 K.B. 1003 (1951).

111. *Id.* at 1013 (emphasis added) (quoting *Mighell v. Sultan of Johore*, 1 Q.B. 149 (1893)).

112. See *id.* at 1003.

113. *Id.* at 1012.

114. *Id.* at 1016.

115. *Id.* at 1010.

116. *Id.* at 1016.

117. See U.S. Department of State, *Background Note: Haiti*, Apr. 2002, available at <http://www.state.gov/r/pa/ci/bgn/1982.htm> (last visited Oct. 31, 2002).

118. *Id.*

119. See *id.*

120. *Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994).

doctor's participation in the failed coup attempt in January 1991.<sup>121</sup> Applying common law notions of absolute immunity, the court dismissed the complaint.<sup>122</sup> The court said that a "head of state recognized by the United States government is absolutely immune from personal jurisdiction in United States courts unless that immunity has been waived by statute or by the foreign government recognized by the United States."<sup>123</sup> The court reasoned that President Aristide, although in exile in the United States at the time of trial,<sup>124</sup> was recognized as the Head of State of Haiti by the United States government.<sup>125</sup> As such, the court did not have jurisdiction regardless of whether Aristide committed a crime that was not in furtherance of his official function as president.<sup>126</sup>

This similar doctrine of absolute immunity was claimed by General Manuel Antonio Noriega, but with a different result.<sup>127</sup> Noriega served as commander of the Panamanian Defense Forces when Panama's President Eric Arturo Delvalle asked for his resignation.<sup>128</sup> Noriega refused, and Delvalle was voted out of power.<sup>129</sup> The United States then invaded Panama with a significant military force and Noriega surrendered to United States forces after several days of seeking asylum with the Holy See.<sup>130</sup> The Eleventh Circuit dismissed Noriega's claims of head of state immunity stating, "the Executive Branch [President George H. Bush] has manifested its clear sentiment that Noriega should be denied head of state immunity."<sup>131</sup>

By granting such deference to the executive branch of the federal government in both instances, the United States' Executive is able to determine who should receive immunity, disregarding the long held tenants of absolute immunity for heads of state. Just by recognizing a nation and its leader as legitimate allows that nation to be granted immunity for his or her actions while leader of that state. Such a blanket grant of power to the executive branch of government may appear overstated. However, the current trend in the doctrine of immunity allows international public opinion (or the opinion in the powerful countries) to decide

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121. *Id.* at 130.

122. *Id.* at 139.

123. *Id.* at 131-32.

124. President Aristide did not return to power until October 1994, after the United States led a 21,000 strong force to enforce United Nations Security Council Resolution 940. The Resolution authorized member states to use all necessary means to restore the elected government to power. See U.S. Department of State, *Background Note: Haiti*, Apr. 2002, *supra* note 114.

125. See Lafontant, 844 F. Supp. at 121.

126. *Id.* at 130. If, for example, the ICTY had jurisdiction over Aristide, he could be charged under Article 5 of the ICTY Statute, with crimes against humanity for acts conducted against civilian populations in Haiti since his return. See Human Rights Watch, *Haiti, the Human Rights Record of the Haitian National Police* (Jan. 1997) available at [http://www.hrw.org/reports/1997/haiti/Haiti.htm#P62\\_1831](http://www.hrw.org/reports/1997/haiti/Haiti.htm#P62_1831) (last visited Nov. 13, 2002) (documenting several instances where the state run police, the Haitian National Police, has conducted extra-judicial executions and acceptance by the government of beatings and other abuses of civilian populations).

127. *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997).

128. *Id.* at 1209.

129. *Id.* at 1209-10.

130. *Id.*

131. *Id.* at 1212.

who should be granted immunity Had the crime by President Aristide been different, or more importantly had it *not* been President Aristide, perhaps the court would have come to a different result. United States courts see head of state immunity not as "a matter of right but rather 'a matter of grace and comity'" where immunity is granted to those friendly with the nation.<sup>132</sup>

### 3. *Deterioration of immunity protection for heads of state*

The trial of Augusto Pinochet, the former leader of Chile, signaled a change in how nations deal with head of state immunity for crimes defined in international law.<sup>133</sup> Pinochet ruled as President of Chile from 1973 to 1990 when he became a Senator for Life pursuant to the Chilean Constitution, and served as Commander-in-Chief for the army for another eight years.<sup>134</sup> Throughout his rule, over 3,000 political opponents were killed or "disappeared,"<sup>135</sup> some of whom were Spanish nationals.<sup>136</sup> In 1998 Pinochet was visiting the United Kingdom for medical treatment when he was arrested following his back surgery.<sup>137</sup> The Spanish government requested his extradition to Spain charging Pinochet with murder, genocide, torture, and conspiracy to torture.<sup>138</sup> A divided panel of the House of Lords ruled that the doctrine of head of state immunity did not apply to actions that were inconsistent with international law.<sup>139</sup> Lord Browne-Wilkinson stated that Pinochet would not be entitled to immunity if he "organised and authorised torture after 8 December 1988,"<sup>140</sup> [for] he was not acting in any capacity which gives rise to immunity *ratione materiae* because such actions were contrary to international law" to which Chile had agreed.<sup>141</sup> Because Pinochet's actions in ordering the torture of certain individuals did not constitute an official function in his role as head of state, the court decided to allow for his extradition to Spain to stand trial.<sup>142</sup> Although Pinochet has not yet stood trial before the court due to health reasons, the decision of the House of Lords indicates a clear departure from the historical

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132. See Ved P. Nanda, *Human Rights and Sovereign Immunity and Individual Immunities (Sovereign Immunity, Act of State, Head of State Immunity and Diplomatic Immunity) – Some Reflections*, 5 ILSA J. INT'L & COMP. L. 467, 475 (1999).

133. See Charles Pierson, *Pinochet and the End of Immunity: England's House of Lords Holds that Former Head of State is not Immune for Torture*, 14 TEMP. INT'L & COMP. L.J. 263 (2000).

134. *Id.* at 264-65.

135. *Id.* at 265.

136. *Id.* at 266.

137. *Id.* at 266-67.

138. Mike Meier & John R. Schmertz, *House of Lords Rules that Crimes of Torture Allegedly Committed During Pinochet Regime in Chile are Extraditable to Extent they Occurred After Ratification of Torture Convention by Chile, Spain and United Kingdom in late 1988; Head of State Immunity Held Inapplicable to Torture Charges as Jus Cogens Offenses*, 5 INT'L L. UPDATE 41 (1999).

139. *Id.*

140. In 1998, the United Kingdom adopted the International Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, allowing for the prosecution of individuals charged with torture.

141. *Regina v. Bartle and the Comm. of Police for the Metropolis & Others Ex Parte Pinochet*, 38 I.L.M. 581, 594 (1999).

142. *Id.* at 643.

notions of head of state immunity. Even if the acts were official, they may still violate international law

The dissenters took a narrower view of what activities constitute official duties.<sup>143</sup> Lord Millet stated that just by agreeing to the Torture Convention, Chile had not waived immunity for its former head of state.<sup>144</sup> Pinochet's acts were in fact government acts: signing orders designed to be carried out by government officials. Head of state functions, according to the dissenters, are not to be determined by international law, as even an oppressive government is still a government.<sup>145</sup>

In times of conflict, immunity has not been granted to those who were beaten. Rather, immunity is often used as a bargaining chip to bring about an end.<sup>146</sup> Immunity is used by powerful nations to encourage regime changes.<sup>147</sup> For example, to encourage peaceful transitions of power, the United Nations has helped negotiate amnesty for leaders of the apartheid regime in South Africa, the Khmer Rouge in Cambodia, and leaders of the military regime in Haiti.<sup>148</sup> Furthermore, states (and the public opinion within those states) have become more willing, as is evident with Milosevic, to try individual leaders in their executive capacity due in part to an increasing significance and acceptance of international human rights law.<sup>149</sup> Much like the Nuremberg court, the desire to put leaders on trial for their actions *after* the international community has decided to act plays an important role in deciding who is tried and for what crimes.

Professor Stephen Krasner calls sovereignty an "organized hypocrisy" where the sovereignty of nations is "frequently compromised through intervention in the form of coercion or imposition by more powerful states, or through contracts or conventions that have involved invitations for external actors to influence domestic authority structures."<sup>150</sup> Where a nation and its leaders are free to act within their particular borders, traditional notions of sovereignty are only followed or agreed to when major nations lack the will to intervene. Professor Krasner states that nations

143. *Id.* at 652.

144. *Id.* at 651 (Lord Millet).

145. See Charles Pierson, *Pinochet and the End of Immunity: England's House of Lords Holds that Former Head of State is not immune for Torture*, 14 TEMP INT'L & COMP L.J. 263, 291 (2000).

146. Michael Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L.J. 507-514 (1999) (stating "When the international community encourages or endorses amnesty for human rights abuses, it sends a signal to other rogue regimes that they have nothing to lose by instituting repressive measures. Such regimes can always bargain away their crimes by agreeing to peace").

147. See generally Larry Rohter, *Mission to Haiti*, N.Y. TIMES, Oct. 5, 1994 at A1.

148. SCHARF, *supra* note 18, at 48-9.

149. JURGEN BROHMER, STATE IMMUNITY AND THE VIOLATION OF HUMAN RIGHTS 221 (Kluwer Law International 1997). Jurgen Brohmer argues that the growing jurisprudence of international humanitarian law contradicts many of the notions of sovereign immunity. It is further argued that notions of sovereign immunity should be further restricted when there are violations of human rights through the adoption of a *Convention on State Immunity* that allows for adjudication of violations of human rights in another state effectively allowing states to try leaders in foreign jurisdiction for violations of humanitarian law.

150. KRASNER, *supra* note 103, at 125, 220.



have intervened in certain target nations for state intolerance of minority populations or religious factions when there was support within the intervening nation for such intervention.<sup>151</sup> United States foreign policy set by the Executive Branch, specifically the State Department, not theoretical notions of state sovereignty determined the outcomes of Noriega and Aristide. Both leaders claimed to be the head of state for their respective nations, and for practical purposes each was the acting head of state, but the label used by the State Department allowed the courts to make their respective judgments. As applied to Milosevic, only after images of forced relocations of ethnic Albanians from the Republic of Kosovo and reports of killings and rapes did NATO breach Yugoslavian sovereignty with a major bombing campaign (keeping its forces mostly out of harm's way). Also at this point, the ICTY delivered its indictment of Milosevic.<sup>152</sup>

#### 4. *ICTY statute and immunity*

The statute of the ICTY does not provide immunity protection for any persons charged in the former Yugoslavia.<sup>153</sup> In so doing, the United Nations Security Council decided that notions of absolute or even restrictive immunity would not apply.<sup>154</sup> The statute gives the tribunal the power to prosecute "a person who planned, instigated, ordered, committed or otherwise aided" in the commission of a breach of the 1949 Geneva Convention, violation of the law of war, genocide, or crime against humanity.<sup>155</sup> The statute further states that, "the official position of any accused person, whether as Head of State or Government shall not relieve such person of criminal responsibility nor mitigate punishment."<sup>156</sup> In enacting the statute, the tribunal does away with the head of state immunity defense for actions undertaken while serving in the capacity of head of state or other official position.<sup>157</sup>

Even though the statute allows for the prosecution of Milosevic in his role as head of state,<sup>158</sup> such an activity was probably not necessary. The statute codifies the demise of any notion of immunity for officials acting against the norms established by the ICTY.<sup>159</sup> New notions allowing for the prosecution of heads of state for their participation, albeit from a removed leadership role of giving orders or even just knowing that such acts are occurring, in war crimes and crimes against humanity would have allowed for the prosecution of Milosevic in other criminal courts. As one scholar stated, "If there is a conflict between the interests of the

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151. *Id.* at 125-26.

152. The Milosevic indictment was delivered on November 22, 2001.

153. Statute of the International Tribunal for the Former Yugoslavia (May 25, 1994) Res. 827 (as amended May 13, 1998 by Res. 1166 & Nov. 30, 2000 by Res. 1329).

154. *Id.*

155. *Id.* at art. 7, para. 1.

156. *Id.* at para. 2.

157. *Id.*

158. *See id.* at art. 7, para. 2.

159. *Id.* at para. 1.

state and the interest of the individual it can no longer be maintained that the interests of the state must always and per se prevail."<sup>160</sup> Gross violations of human rights may cause nations to intervene and violate sovereignty for the stated purpose of ending such violations, as in the Balkan states, and be approved by international law.

### 5. *Extradition of Milosevic*

Milosevic, on his flight to The Hague with his United States captors and officials from the ICTY claimed he was being kidnapped.<sup>161</sup> The ICTY rejected this argument of kidnapping in violation of international law on the basis that a formal extradition treaty existed between the court and the Federal Republic of Yugoslavia.<sup>162</sup> The ICTY is unable to enter Yugoslavia and capture any of the indicted individuals and is dependent upon international cooperation for capturing war criminals like Milosevic.<sup>163</sup> Without a police force, it is reliant upon other nations to enforce its jurisdiction over any of the "fugitives" that it seeks.<sup>164</sup>

The Milosevic arrest is not the first instance of international kidnapping sanctioned by the courts. One of the most well known abductions was the abduction of former Nazi leader Adolf Eichmann by an Israeli Special Forces unit while he was in Argentina after World War II.<sup>165</sup> Although Israel was forced to pay reparations to Argentina for violations of its sovereignty<sup>166</sup> the actual kidnapping was allowed.<sup>167</sup> Eichmann faced trial by the Israeli court and was eventually convicted and put to death for his participation in killing of millions of Jews during World War II.<sup>168</sup> This was also the case with the arrest of Panamanian General Noriega who was carted off to a United States court after soldiers invaded Panama.<sup>169</sup> Following the United States Supreme Court's ruling in *United States v. Alvarez-Machain*,<sup>170</sup> the court adjudicating the claims against Noriega said that in order to prevail on an extradition treaty claim, Noriega had to show that the United

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160. BROHMER, *supra* note 146.

161. SCHARF, *supra* note 18, at 106.

162. *Id.*

163. See Judge Gabrielle Kirk McDonald, *Address to the United Nations General Assembly* (Nov. 8, 1999), available at <http://www.un.org/icty/pressreal/p445-e>.

164. *Id.*

165. See generally HANNAH ARENDT, *EICHMANN IN JERUSALEM* (Penguin Books 1994) (1963).

166. See U.N. SCOR, 15th Sess., 867th mtg., at 1-2, S/P V 867 (1960). For history of the diplomatic efforts between Argentina and Israel, see Mathew Lippman, *Genocide: The Trial of Adolf Eichmann and the Quest for Global Justice*, 8 BUFF HUM. RTS. L. REV. 45, 54-64 (2002).

167. *Id.*

168. In addition to the issues regarding Eichmann's extradition from Argentina, Eichmann's appearance created an obvious fiction in Israeli law where the accused is deemed innocent until proven guilty. In explaining why Israel had violated Argentine law, Israeli Prime Minister Ben-Gurion said, "it was Eichmann who organized the mass murder, on a gigantic and unprecedented scale. See ARENDT, *supra* note 166.

169. *United States v. Noriega*, 117 F.3d 1206, 1210 (11th Cir. 1997).

170. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (holding that the abduction of a criminal defendant from nation with whom United States has extradition treaty is not in violation of treaty and may be tried in district court for criminal law violations).

States had agreed not to seize him.<sup>171</sup>

Professor Sheri Burr poses the question of whether kidnapped individuals accused of human rights violations possess a legal right to be brought before an international court.<sup>172</sup> Her answer is no, claiming that such actions are not morally or legally justified and makes citizens of states feel less secure.<sup>173</sup> Furthermore, she argues that the kidnapping of alleged offenders erases their rights to fair trials and benefits the powerful states that have the means to conduct a successful kidnapping.<sup>174</sup> Although these concerns may be valid, so long as the nation is allowed reparations for the violation of its territorial integrity, and there is a desire by the international community to see that the individual is brought before a tribunal, the international community appears willing to allow for the kidnapping of officials and others.<sup>175</sup> While the ICTY has decided that it does have jurisdiction over individuals who are brought to stand trial before it against their will,<sup>176</sup> the question remains how other courts, such as the ICC, will be able to assert jurisdiction over an individual brought before it.

### PART III—RATIONALIZING MILOSEVIC'S TRIAL

The indictment of Milosevic was handed down in May 1999 sixty days after the NATO bombing campaign began, eight years after the conflict in Yugoslavia started, four years after Milosevic signed the Dayton Peace Accords, and well after the arrival of thousands of United Nations peacekeeping troops. It came at a time when support in NATO nations for activities in the former Yugoslavia was declining.<sup>177</sup> The bombing of the Chinese Embassy in Belgrade, and the use of cluster bombs and depleted uranium munitions on military and civilian targets, strengthened political opposition in NATO countries.<sup>178</sup> It appears that the Milosevic indictment was delivered at such a time to show that an end of the conflict, and therefore foreign involvement, was in sight and there was a goal of arresting and bringing to justice international war criminals.

#### 1. *Non-cooperation of Yugoslav republics*

Since the creation of the ICTY the main problem that the tribunal has faced has been its inability to arrest and put on trial the leaders in the former Yugoslavia responsible for the atrocities. With the exception of Milosevic, the other major

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171. Noriega, 117 F.3d at 1213.

172. Sherri L. Burr, *From Noriega to Pinochet: is there an International Moral and Legal Right to Kidnap Individuals Accused of Gross Human Rights Violations*, 29 DENV. J. INT'L L. & POL'Y 101 (2001).

173. *Id.* at 114.

174. *Id.* at 112.

175. See Alvarez-Machain, 504 U.S. at 655.

176. See Prosecutor v. Dusko Tadic, Judgment of the Trial Chamber, IT-94-I-A (1997) (stating "The Statute grants competence to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991").

177. SCHARF, *supra* note 18, at 102.

178. *Id.*

Bosnian-Serb leaders Radovan Karadzic and Ratko Mladic have been charged with war crimes but remain at-large.<sup>179</sup> As of March 2004, the ICTY has issued over 110 indictments with ninety-one individuals in proceedings before the tribunal.<sup>180</sup> Twenty indicted individuals however, remain at large.<sup>181</sup> Without any enforcement power at its disposal, the ICTY has relied upon “dumb luck” for finding and arresting those before the tribunals.<sup>182</sup> The current governments of the nations making up the former Yugoslavia have been reluctant to turn over war criminals to the Tribunal, putting into question the court’s effectiveness.<sup>183</sup> The United States has made some efforts to pressure the nations of the former Yugoslavia into cooperating with the ICTY.<sup>184</sup> In May 2002, a freeze on financial assistance was lifted and roughly \$40 million in aid and \$300 million in frozen assets were handed over after Yugoslav officials agreed to respond to document requests.<sup>185</sup>

Former ICTY President Claude Jorda recently complained, “The Federal Republic of Yugoslavia is not co-operating in tracking down, arresting and transferring to The Hague certain of the accused.”<sup>186</sup> While arrest warrants have been issued and evidence for other indictments requested, these requests have been summarily ignored.<sup>187</sup> The refusal to cooperate extends beyond Serbia. For example, Croatia has refused to turn over General Janko Bobetko, indicted for killing over 100 Serbs in a 1993 military campaign, with the official position that the massacre was part of a legitimate military operation.<sup>188</sup> However, since some leaders in Serbia saw fit to allow United States troops to take Milosevic to The Hague rather than see him tried in Serbian courts, the ICTY has its first “big catch.” Therefore, the inability of the ICTY to function without international assistance is a major weakness of the court.

## 2. *Factors causing international intervention*

NATO’s intervention into the Balkan region poses several questions as to the legality of the act under international law.<sup>189</sup> Article 2 (4) of the United Nations

179. *Id.*

180. *Id.*

181. *Id.*

182. See, e.g., SCHARF, *supra* note 18, at 250-51 (describing an arrest that took place in January of 1996 when Bosnian Serb General Djordje Djukic and Colonel Aleksa Krsmanovic took a wrong turn in the city of Sarajevo and ran into the Bosnian police who promptly arrested them even though neither had been indicted by the ICTY. The two were transferred to a Bosnian jail where French soldiers took them away to a United States airbase and then to The Hague. Upon their arrival, prosecutors scrambled and General Djukic received an indictment and Colonel Krsmanovic was eventually set free).

183. BEIGBEDER, *supra* note 44, at 161-2.

184. Bruce Zagaris, *Yugoslav Tribunal Flourishing*, 18 INT’L ENFORCEMENT L. REP. 310 (2002).

185. *Id.*

186. *Hague Tribunal Calls for UN Pressure on Belgrade*, REUTERS NEWS, Oct. 23, 2002.

187. *Id.*

188. *Britain Demands Croatia Accept Indictment of War Criminal*, AP NEWSWIRE, Oct. 15, 2002.

189. For example, the Russian Federation proposed a United Nations Security Council resolution to require NATO to cease bombing and declare the act as unlawful but was vetoed by the NATO states. See *Security Council Rejects Demand for Cessation of Use of Force against Federal Republic of Yugoslavia*, UN press Release SC/6659 (Mar. 26, 1999).

charter asks members to "refrain" from the "threat of force or use of force" in conducting their international relations.<sup>190</sup> The Article was violated by NATO's threat and ultimate use of air strikes against Yugoslavia.<sup>191</sup> However, since the end of the Cold War, there has been a shift in international law that allows for the justification of intervention on "humanitarian" terms; internal conflicts involving human rights violations or other crimes against humanity pose a threat to international peace and security and thereby provide the authority to intervene.<sup>192</sup> In addition to sending peacekeeping troops to the Balkans, the United Nations has attempted such humanitarian intervention in Somalia, Rwanda, and in East Timor.<sup>193</sup> In Somalia, however, United Nations, and United States, casualties quickly turned the stomach of nations sending peacekeeping forces.<sup>194</sup> The United Nations' failure in Somalia to stop warring factions led to its reluctance to intervene in Rwanda<sup>195</sup> and then later to deploy troops in Bosnia<sup>196</sup> but to keep them out of harm's way. But, the prospects of providing humanitarian assistance to the Kosovars, after the international community witnessed the ramifications of earlier failures including efforts in Bosnia, allowed NATO to act albeit without Security Council authorization.<sup>197</sup>

Professor Gary Bass argues that there are limits for when a liberal, or democratic, state will act.<sup>198</sup> The idealism that can cause a state to act against the "face of foreign wickedness" can also cause a turning away and abandonment of the pursuit of justice.<sup>199</sup> According to Professor Bass, there are a number of factors that cause a liberal state to pursue war criminals through an international criminal

190. U.N. CHARTER art. 2, para. 4.

191. See Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects, Kosovo: A Thin Red Line*, 10 EUR. J. INT'L. L. 1 (1999), also available at <http://www.ejil.org/journal/Vol10/No1/ab1-2.html#Heading2>.

192. See Louis Henkin, *NATO's Kosovo Intervention: Kosovo and the Law of "Humanitarian Intervention"*, 93 A.J.I.L. 824, 825 (1999) (arguing that unless the military action is sanctioned by the Security Council, unilateral or even collective action such as the NATO bombing of Serbia after its invasion of Kosovo, is unlawful); see also Ved P. Nanda, *Human Rights and Sovereign and Individual Immunities (Sovereign Immunity, Act of State, Head of State Immunity and Diplomatic Immunity) – Some Reflections*, 5 ILSA J. INT'L & COMP. L. 467 (1999) (arguing that a human rights exception ought to be added to the United States Foreign Sovereign Immunities Act "to allow the law to catch up with the monumental progress of international human rights law").

193. See *Background Note, United Nations Peacekeeping Operations*, Jan. 15, 2004, available at <http://www.un.org/peace/bnote010101.pdf>.

194. See e.g., Editorial, *The United Nations at 50*, N.Y. TIMES, June 26, 1995, at A14.

195. Secretary General Kofi Annan said, "Confronted by gross violations of human rights in Rwanda and elsewhere, the failure to intervene was driven more by the reluctance of Member States to pay the human and other costs of intervention, and by doubts that the use of force would be successful, than by concerns about sovereignty. See *Report of the Secretary-General on the Work of the Organization*, U.N. GAOR, 54th Sess., 4th plen. Mtg., at 1, U.N. Doc. A/54/PV.4 (1999).

196. *Id.*

197. See Simma, *NATO, the UN and the Use of Force: Legal Aspects, Kosovo: A Thin Red Line*, 10 EUR. J. INT'L. L. 1 (1999) (stating "we would be well advised to regard the Kosovo Crisis as a singular case in which NATO decided to act without Security Council authorization out of overwhelming humanitarian necessity, but from which no general conclusion out to be drawn).

198. See generally BASS, *supra* note 3.

199. *Id.* at 5.

court.<sup>200</sup> These factors are a sense of legal norms, desire to protect the intervening nation's soldiers over the lives of foreigners, an appearance that there has been war against the liberal states, public opinion is such that the outrage is able to influence the democratic process, and there is pressure by non-state actors such as non-governmental organizations.<sup>201</sup> In applying these factors, it makes sense why the United Nations chose to establish a tribunal rather than use ground forces to stop the war in the region. The United States and the international community did not want to intervene forcefully but were willing to make the effort to provide a court where those responsible for the carnage would be brought to justice. The United States' reluctance to intervene during the height of the conflict in the early 1990's was evident when President Bill Clinton in May 1993, refused again to send troops to the region saying "we don't want our people in there, basically in a shooting gallery."<sup>202</sup> It was not until the downing of an American pilot and the capture of three American soldiers in 1999 did support for more action grow in the United States and NATO intensified its air bombings.<sup>203</sup>

There are numerous places where an international tribunal such as the ICTY could be applied but the international community has decided not to take action against the heads of state even after they have left their positions and are either living or have lived abroad. Some of these suspected criminals include: Pol Pot, leader of the Khmer Rouge and head of state during the killing fields in Cambodia;<sup>204</sup> Idi Amin, former ruler of Uganda, who lives in exile and is suspected of over 300,000 politically motivated killings;<sup>205</sup> Mengistu Haile Mariam, former Ethiopian dictator, also in exile, and allegedly responsible for up to 1 million Ethiopian deaths;<sup>206</sup> Jean Claude Duvalier, former Haitian President, who along with his father are estimated to have ordered the deaths of between twenty and thirty thousand Haitian civilians;<sup>207</sup> and former Indonesian General Suharto who may be responsible for thousands of civilian deaths when he came to power in the mid 1960's, and later when Indonesian forces invaded East Timor in 1975.<sup>208</sup>

Where the United Nations has decided to intervene there have been results.<sup>209</sup> Former Prime minister of Rwanda, Jean Kambanda, was sentenced to life in prison

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200. *Id.*

201. *Id.* at 29-35.

202. Quoted in *id.* at 214.

203. See George Jahn, *Captured US Soldiers To Be Tried*, ASSOCIATED PRESS Apr. 1, 1999.

204. No state was willing to put Pol Pot on trial for his actions as leader and died prior to the establishment of a tribunal similar to the ICTY. All but two of the prominent Khmer Rouge figures remain free. See Mary Margaret Penrose, *It's Good to be the King!: Prosecuting Heads of State and Former Heads of State Under International Law*, 39 COLUM. J. TRANSNAT'L L. 193, n. 9-10 (2000).

205. *Id.* at note 11.

206. *Id.* at note 12.

207. See Human Rights Watch, *Haiti, Thirst for Justice, a Decade of Impunity in Haiti*, 1996, available at <http://www.hrw.org/reports/1996/Haiti.htm> (crediting the Duvaliers with driving hundreds of thousands of Haitians into exile, fleeing official torture and murder).

208. *Suharto Crimes Against Humanity*, INSIDE INDONESIA DIGEST 60, May 22, 1998, available at <http://www.insideindonesia.org/digest/dig60.htm> (last visited Jan. 26, 2004) (arguing for an international criminal tribunal similar to the ICTY for crimes committed by the Suharto regime).

209. *Id.*

for crimes against humanity and genocide against the civilian Tutsi population in Rwanda.<sup>210</sup> Kambanda was turned over to the International Criminal Tribunal for Rwanda after Kenyan authorities arrested him.<sup>211</sup> This dynamic, where certain individuals are prosecuted, or even indicted, is representative of a system of international law that is "constrained on one end by voluntary compliance of consenting sovereign states and on the other by the political deadlock of the moment."<sup>212</sup> Only after the international community achieves a political will and states which are harboring suspected criminals opt to participate are those who caused the atrocities put to trial. It took a significant NATO bombing campaign, a regime change, and the arrest and subsequent middle of the night extradition, for Milosevic to come to trial.<sup>213</sup>

While the world continues to sit idle as other atrocities continue, the desire of the ICTY to avoid appearances of "victors' justice" is doomed. Without the consistent application of international law to all individuals, the stigma and precedent of the Nuremberg court will remain. "In the last analysis, the two international war crimes tribunals in The Hague and Arusha stand largely as testaments to the failure of America and the West. Had the West managed to summon the political will to stop the slaughters in Rwanda and Bosnia, there would have been no need for these two fragile experiments in international justice."<sup>214</sup> Professor Bass sees the experience of the war crime tribunals as having potential to work.<sup>215</sup> But with the exception of Nuremberg, they have not worked as well as possible.<sup>216</sup> The ICTY began with a lengthy trial of an insignificant player, Dusko Tadic, not the way that would have given the tribunal the legitimacy or recognition that it needed.<sup>217</sup> Now with the potential that Milosevic may continue his lengthy trial to his death, or even to victory as some have questioned, the lack of success of the ICTY to prosecute the high-ranking officials of the Balkan conflict may spell the practical demise of a functioning and operational International Criminal Court.

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210. See *The Prosecutor v. Jena Kambanda*, Judgment and Sentence of Sept. 4, 1998, ICTR 97-23-S, available at <http://www.ictt.org>, (last visited Nov. 17, 2002).

211. *Id.*

212. See Penrose, *supra* note 201.

213. BASS, *supra* note 3 at 240 (stating that at the end of the Dayton Peace Accords in 1995, seventy-percent of the American public did not want to see troops in Bosnia: one poll conducted by the White House stated that the last thing that American troops should be used for was arresting war criminals)., See Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L L. REV. 321, 340 (1999) (arguing that courts such as the ICTY should not precede the end of a conflict without first establishing a mechanism to ensure enforcement); See *Prosecutor v. Erdemovic*, Case No. IT-96-22, Int'l Crim. Trib. for the Former Yugo., Trial Chamber, Sentencing Judgment (May 29, 1996), available at <http://www.un.org/icty/judgement.htm>; see also Article 24 of the Statute of the ICTY (stating that "the penalty imposed by the Trial Chamber shall be limited to imprisonment").

214. BASS, *supra* note 3, at 283.

215. *Id.* at 310.

216. *Id.*

217. Fact Sheet on ICTY Proceedings, at <http://www.un.org/icty/glance/index.htm>.

## PART IV — THE LEGACY OF THE TRIAL

The trial of Slobodan Milosevic brings many “firsts” to international criminal trials. In addition to the first trial of a head of state for war crimes, the trial has brought wartime adversaries into the opposing sides of a courtroom, with one head of state testifying against another.<sup>218</sup> The trial of Milosevic, and others at The Hague, will have lasting impacts in the region and the world, especially with the creation of the ICC, as Milosevic’s trial is certain to be a “harbinger of [the] future when there will be more trials like this.”<sup>219</sup>

### 1 *Impact in the former Yugoslavia*

The international community hopes that the Milosevic trial and the ICTY will help create some healing in the former Yugoslavia.<sup>220</sup> This in part has already happened with the uneventful reelection attempt of Vojislav Kostunica as President of the Republic of Yugoslavia.<sup>221</sup> Milosevic’s trial also has played an important role in increasing the tribunal’s effectiveness and credibility.<sup>222</sup> Furthermore, the trial may help educate the people of Croatia, Bosnia and Herzegovina, Kosovo, Serbia, and the world as to what happened so that such acts do not occur in the future. However, reliance upon the tribunal to prosecute war criminals by the governments of the Balkan states has not served to develop local war crimes prosecutions in the regions of the former Yugoslavia.<sup>223</sup>

In order for the ICTY to meet its goals, the international community should take a sincere interest in the ICTY’s operations. The yearly budget of the ICTY has increased from \$276,000 in 1993 to over \$223,000,000 for 2002-2003 and a staff of 1238 from eighty-four countries.<sup>224</sup> Yet, with the increase in staff and resources, the ICTY continues to face critical resource shortages.<sup>225</sup> It also struggles with logistical problems such as providing a place where convicted war criminals are to be imprisoned; making it reliant upon United Nations member states to house convicted criminals.<sup>226</sup> The ICTY also does not have any

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218. Marlise Simons, *Croat Leader Says Milosevic Made “Rivers of Blood,”* N.Y. TIMES, Oct. 2, 2002, at A7 (describing the testimony of Croatian President Stjepan Mesić against Milosevic, and appearing as the first head of state to appear as a witness at the ICTY).

219. *Id.* (quoting Richard Dicker).

220. *Id.*

221. See Misha Savic, *President Kostunica Carries on Legal Battle over Failed Elections*, AP NEWSWIRES, Dec. 14, 2002 (reporting that some argue that there is a lack of interest in that not enough people are voting to satisfy the constitutional requirements).

222. See David Tolbert, *The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26 FLETCHER F. WORLD AFF. 7 (2002) (arguing that the increase in credibility comes after NATO troops allowed indicted individuals, such as Mladić and Karadžić, to pass through checkpoints without arrest).

223. *Id.* at 15 (citing the failure of the ICTY to have a significant impact on the region’s justice system as a major failure of the ICTY “tarnish[ing] the successes that the tribunal has seen”).

224. Fact Sheet on ICTY Proceedings, available at <http://www.un.org/icty/glance/index.htm> (last visited Jan. 26, 2004).

225. *Id.*

226. *Id.*



enforcement mechanisms to make sure that those who are indicted are brought to trial.<sup>227</sup> As it is, the ICTY is dependent upon NATO and the United Nations to bring the indicted individuals to trial.<sup>228</sup> Without a police force and a jail, the basic necessities of a criminal justice system,<sup>229</sup> it promises to continue to be an uphill battle of legitimacy for the ICTY

The ICTY was created in the midst of fighting in Yugoslavia.<sup>230</sup> Cries for an end to the conflict from those who became refugees, lost loved ones, or had their homes destroyed found little comfort when the international community sent resources to the establishment of a court in The Hague to try those who were at the time in the *act* of causing harm.<sup>231</sup> It will be hard for those who were forced to flee their homeland from the fighting and destruction to not be skeptical of promises of justice. Unlike the Nuremberg Trials, where the sentence of death was possible, the ICTY statute limits punishment to imprisonment.<sup>232</sup> Concerns over the legitimacy of the death penalty aside, the inability to impose such a penalty may also cause greater skepticism that "justice" will be done when those who have lost all that they have seek vengeance rather than "justice."<sup>233</sup>

## 2. *Impact on the establishment of the ICC*

In an attempt to do away with ad hoc criminal tribunals, the United Nations General Assembly convened the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Court, which created the Rome Statute of the ICC.<sup>234</sup> Nations within the international community have been trying for some time to establish such a court<sup>235</sup> before the statute came into effect on July 1, 2002.<sup>236</sup> The ICC was created to prosecute those responsible for international crimes.<sup>237</sup> United Nations Secretary-General Kofi Annan stated, "In the Prospect of an international court lies the promise of universal justice."<sup>238</sup> The

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227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. See Penrose, *supra* note 210.

232. Prosecutor v. Erdemovic, *supra* note 210.

233. *Id.*

234. *Rome Statute of the International Criminal Court Overview*, available at <http://www.un.org/law/icc/general/overview.htm> (last visited Nov. 19, 2002).

235. *Id.* (discussing the history dating back fifty years from when the United Nations first recognized the need to establish an international criminal court).

236. The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted the statute creating the ICC on July 17, 1998, in Rome, Italy. There are currently 139 signatories to the treaty, and eighty-four who have ratified it. Although the United States signed the treaty in 2000, in May of 2002, the United States withdrew from the treaty. See *Rome Statute of the International Criminal Court: Ratification Status*, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/part1/chapterXVIII/treaty10.asp> (last visited Nov. 19, 2002).

237. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/Conf.183/9 (1998), reprinted in 37 I.L.M. 999 (1998) (hereinafter Rome Statute).

238. *Id.*

goal of the ICC to help end conflict, to act when other criminal justice institutions are unwilling, and deter future war criminals<sup>239</sup> is dependent upon being able to exercise jurisdiction over the “wrong-doers.”

The ICC will have jurisdiction over “the most serious crimes of concern to the international community as a whole” including the crime of genocide, crimes against humanity, war crimes and the crime of aggression.<sup>240</sup> Just like the ICTY the ICC does not recognize head of state immunity.<sup>241</sup> The statute states, “official capacity as a Head of State. shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.”<sup>242</sup>

Many see the ICTY as a trial run for how the ICC will proceed.<sup>243</sup> Some commentators claim that the ICC does not solve the problems that are inherent in international criminal justice.<sup>244</sup> Judge Gabrielle Kirk McDonald in her address to the United Nations said, “Mr. President, the international community is in the initial stages of establishing the ICC. Make no mistake about it: if the international community does not ensure that the orders of the Court are enforced, it is bound to go the way of the League of Nations.”<sup>245</sup> Without an international police force to enforce violations of international criminal law, the effect of the ICC would be to serve as an international reprimand for criminal acts. Indictments, such as those delivered by the ICTY against the Bosnians Ratko Mladic and Radovan Karadzic, would go unheeded unless there is some incentive for the country to turn over the individual or unless it has no choice.

The ICC foresees a world where nation states will assist in the implementation and enforcement of international law.<sup>246</sup> Enforcement mechanisms of the ICC are similar to the ICTY with both placing a “general obligation to cooperate” upon states in the prosecution and investigation,<sup>247</sup> and leaving states to “continue to pursue their own self-interests at the cost of enforcing international law.”<sup>248</sup> The court can only work effectively with participation at all times by all

239. *Id.*

240. *Id.* at art. 5, sec. 1.

241. *Id.* at art. 27, sec. 2.

242. *Id.* at art. 27, sec. 1.

243. See David Tolbert, *The Evolving Architecture of International Law*, 26 FLETCHER F WORLD AFF 7, 8 (2002) (stating, “The ICTY has grown into an effective court, which has painstakingly administered trials that are widely perceived as fair. In the process, the tribunal’s judges have developed an important body of international law and criminal procedure that will serve as critical guideposts for the ICC as well as other prosecutions for serious violations of international humanitarian law.”).

244. See William Miller, Comment, *Slobodan Milosevic Prosecution by the International Criminal Tribunal for the Former Yugoslavia: A Harbinger of Things to Come for International Criminal Justice*, 22 LOY L.A. INT’L & COMP L. REV. 553 (2000) (citing the potential major problems with the ICC are issues of state sovereignty and cooperation of states as well as overcoming political obstacles).

245. See Judge Gabrielle Kirk McDonald, *Address to the United Nations General Assembly* (Nov. 8, 1999), available at <http://www.un.org/icty/pressreal/p445-e>.

246. See Penrose, *supra* note 210, at 352.

247. *Id.*

248. *Id.* at 356. Professor Penrose continues, “International criminal law cannot depend on the

involved. However, as seen with Milosevic, states are willing to satisfy their self-interests and provide a court to resolve disputes or try criminals when it satisfies those interests.

### 3. *What if Milosevic wins?*

Milosevic, who is a trained lawyer, has so far put on a good show. The question then, is what happens if the prosecution is unable to tie him to making the orders to conduct the mass executions and other crimes that he is charged with committing and, as a result, he wins. Of course, it is not clear what will happen; presumably if he wins, he would return to Serbia and face whatever trial may be conducted for abuse of power. If convicted, he would likely serve the rest of his life in a European prison.<sup>249</sup> But the end result to Milosevic, who may not even be able to finish the trial based upon his failing health, is perhaps insignificant compared to the precedent that his trial will establish in trying heads of state before the ICC.

If Milosevic wins, then the international community may be less likely in the future to seek out war criminals and bring them before a tribunal. It would appear easier and a less lengthy process to attempt to kill the leaders either by assassination or bombing then go through the long drawn out process of a trial with the potential of not convicting the leader.<sup>250</sup> If Milosevic loses, then nations will have a precedent regarding the level of resources required to convict such an individual. States may also require bribes and/or bounties in order to turn over suspected criminals, as has been the case with the ICTY.<sup>251</sup>

Cases that will go to the ICC are those where the local courts would not charge an actor for his participation in a crime against humanity, war crime, or crime of genocide.<sup>252</sup> Therefore, it is unlikely for an individual who is not convicted by the ICC to be tried in his or her home country afterwards. If the country has little incentive to turn over the individual in the first place, then it would also have little incentive to cooperate with the ICC and produce the

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acquiescence of powerful nations. Otherwise, international tribunals return to the setting of "victors' justice," which begs the question whether international criminal law is capable of equitable distribution. Without salient enforcement, international criminal law provides only the enticing mirage of justice. *Id.* at 364.

249. See Statute of the International Tribunal, *supra* note 150, at art. 27. As of March 11, 2004, ten nations have signed agreements with the United Nations to enforce sentences delivered by the ICTY. These include Italy, Finland, Norway, Sweden, Austria, France, Spain, Denmark, Germany, and the United Kingdom. Press Release, United Nations, The United Kingdom The 10th State to Sign an Agreement on the Enforcement of Sentences With the ICTY, (Mar. 11, 2004), available at <http://www.un.org/icty/pressreal/2004/p830-e.htm>.

250. The United States war with Iraq provides an example of where numerous attempts to kill the leader of Iraq, Saddam Hussein, failed only to later find him and take him prisoner. The United States has assured people that his trial will be "fair and transparent," however, it does not appear that an impartial tribunal will sit in judgment of the former dictator. See Neil Lewis, *Bush Leaves Unclear Role of Iraqis in Any Trial*, N.Y. TIMES, Dec. 15, 2003, at A18.

251. See discussion in Part I (3) of this paper.

252. Rome Statute, art. 5, sec. 1.

documents and required materials for a conviction.

### CONCLUSION

The ICTY's attempts at steering clear of claims of "victor's justice" are commendable, however, the reality of the Tribunal makes it impossible to enforce its statute without having some nation, or group of nations, hand over the indicted criminals.<sup>253</sup> States will only take the risk of arresting international criminals if they know they have the evidence to convict. Attempts at impaneling an impartial jury will not overcome the intense pressure to convict. Without each nation ceding jurisdiction to the ICC, it will be lost to the claims of victor's justice from those nations who expect the most from the court's ability to prosecute wrong-doers, those nations that are not strong enough to be the "victors."

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253. See Penrose, *supra* note 233.

